Dr Zakir Abdul Karim Naik v Kula Segaran a/l V Murugeson

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-23CY-64–11 OF 2019
QUAY CHEW SOON JC
2 APRIL 2021

Civil Procedure — Discovery — Discovery and production of documents — Rules of Court 2012 O 24 r 3 and/or 7 — Whether documents requested for were relevant and necessary for disposing fairly of the suit and for saving costs — Whether defendant did not delay in making the application — Whether application was bona fide and not to delay the trial — Whether although O 24 of ROC allowed order for discovery to be made 'at any time' or 'at any stage of the proceedings' it was expedient to order discovery after close of pleadings so that the issues were crystallised and defined

The plaintiff ('P') had sued the defendant ('D') for defaming him in an article published by an online media portal ('the first article') and again, some two years later, in a press statement ('the second publication'). In the first article, D (a lawyer, Member of Parliament, National Vice-Chairman of an opposition party ('DAP') and a former Human Resources Minister of Malaysia) called on the Federal Government not to provide a safe haven for P, an Islamic preacher and citizen of India, because the authorities in India wanted to investigate him on allegations of carrying out terrorist activities and money-laundering. Inter alia, D said Malaysia's international image would suffer by its continued harbouring of P and giving him the privilege of permanent residency when the proper thing to do was to extradite P to India so that he could clear his name on the alleged criminal charges. In the second publication, D hit out at P for making public remarks that were offensive and unsettling to Malaysian Hindus and which threatened national unity and solidarity. Again, D called upon the Government to extradite P to India to face the charges of terrorism and money-laundering. P, who claimed that he was granted permanent residency status in Malaysia, alleged that the publications by D ridiculed and humiliated him and imputed that he was, inter alia, a criminal who was evading arrest, a dishonest preacher who used religion to sow seeds of hate and dissension and a person who was out to break up the unity and solidarity of the people in Malaysia by exploiting racial and religious issues for his own survival and benefit. In his statement of defence, D denied defaming P and, among other things, pleaded that the authorities in India had banned the Islamic Research Foundation ('IRF') and a television channel known as Peace TV, both founded and controlled by P, on the ground that those two entities were used for the promotion of terrorism and hate speeches. Further, or in the alternative, D relied upon the defences of justification, fair comment and qualified privilege.

D subsequently applied (vide encl 29) for discovery and production of documents against P pursuant to O 24 r 3 and/or 7 of the Rules of Court 2012. The documents that D required P to produce were: (a) all documents relating to P's permanent resident ('PR') status including his application for PR, the approvals given by the relevant authorities on the matter, and a copy of P's PR card and his passport endorsed with the entry permit ('item 1'); (b) all documents relating to P's denial of entry into the United Kingdom ('UK') and Canada and his two challenges against that denial in the UK Courts in 2010 and 2011 against the Secretary of State for the Home Department ('items 2 and 3'); (c) all documents relating to P's position in and relationship to the IRF and Peace TV/Peace TV Urdu ('item 4'); (d) all correspondence, documents and other communications between India's Directorate of Enforcement, Department of Revenue, to P or the IRF ('item 5'); (e) copies of all court documents relating to the challenges brought by or on behalf of P or by or on behalf of IRF against the said Enforcement Directorate ('item 6'); (f) all documents relating to the suspension of the licence of Peace TV/Peace TV Urdu by Ofcom UK ('Item 7'); and (g) all other documents material and relevant to the facts and matters pleaded in D's defence in P's custody, care and control which would either adversely affect P's claim or support D's claim or might lead to a series of inquiry resulting in the obtaining of information which might either adversely affect P's claim or support D's claim ('item 8'). In opposing encl 29, P said, inter alia, that the documents requested for were irrelevant, that they were not in his possession (and therefore he could not produce them), that there was undue delay in the filing of encl 29 and that the filing of encl 29 was to delay the trial of the defamation suit.

Held, ordering P to produce the documents listed in items 2 and 3, 4, 5, 6 and 7 but disallowing production of the documents listed in items 1 and 8:

(1) The test for ordering discovery and production of documents was whether the documents in question were necessary either for disposing fairly of the matter or for saving costs, per O 24 r 8 and r 13(1) of the ROC (see para 16).

(2) As a matter of pleading, the issue of P's alleged denial of entry into the United Kingdom and Canada and his challenges in the UK Courts against that denial were clearly raised. So were the issues of P's relationship with the Islamic Research Foundation and Peace TV, the actions between the Indian authorities and P or the Foundation as well as the banning of Peace TV. Therefore, production of the documents listed in items 2 and 3 as well as 4, 5, 6 and 7 were necessary and relevant to the issues raised in the instant case. They were necessary both for disposing fairly of the instant suit and for saving costs (see paras 24, 32 & 46).

(3) Production of the documents requested for in item 1 was disallowed because it was not relevant to the issues to be tried in the instant suit. P

had produced a copy of his PR card number. That was evidence of his PR status. How he obtained the PR, whether P fulfilled the conditions for the grant of an entry permit and whether the PR was obtained illegally (as alleged by D) did not arise for this court's determination. This was not the proper forum to determine the validity or otherwise of P's PR (see paras 78–80).

(4) Production of the documents asked for in item 8 was disallowed because the request in item 8 did not specify any particular document or class of document and seemed to be a fishing expedition for evidence (see paras 81–82).

(5) The allegedly defamatory remarks in the instant case were based on matters reported in various news media. In this action, P had put those matters in dispute. The primary evidence for those matters were in P's possession, custody or power. Therefore, P had to produce the documents that were necessary or relevant in determining those matters. Order 24 r 3 of the ROC (concerning an order for discovery of documents) referred to documents 'which are' or 'have been' in one's possession or power. Similarly, O 24 r 7 referred to a document or class of documents which 'is' or 'has at any time been' in a party's possession, custody or power. If not then in his possession, custody or power, that party had to explain by way of affidavit 'when he parted with it and what has become of it' (see paras 54 & 57–58).

(6) The discoverable documents under O 24 of the ROC included documents that were within P's power or control to produce and included documents which P had a right to obtain although they were not within his actual or physical possession. This would include documents which were or had been in the possession of P's agent, documents in relation to court proceedings or enforcement actions brought against P in India or the United Kingdom and those concerning the IRF and Peace TV (see paras 59–63).

(7) On the facts, there was no delay on D's part in filing encl 29; much less, any inordinate or unreasonable delay that would justify dismissing encl 29. Nor was D trying to delay the trial by filing encl 29. The court found encl 29 to be bona fide for a fair disposal of the matter and for the saving of costs. The court had a wide discretion as to when to order discovery. Although under O 24 of the ROC such order could be made 'at any time' and 'at any stage of the proceedings', it was more expedient to order discovery after the close of pleadings so that the issues were crystallised and defined by the pleadings (see paras 69–70 & 75–76).

[Bahasa Malaysia summary

Plaintif ('P') telah menyaman defendan ('D') kerana memfitnahnya dalam satu artikel yang diterbitkan oleh portal media dalam talian ('artikel pertama

tersebut') dan sekali lagi, dua tahun kemudian, dalam satu kenyataan media ('penerbitan kedua tersebut'). Dalam artikel pertama, D (seorang peguam, Anggota Parlimen, Naib Pengerusi Nasional sebuah parti pembangkang ('DAP') dan mantan Menteri Sumber Manusia Malaysia) memohon Kerajaan Persekutuan untuk tidak menyediakan tempat perlindungan selamat kepada P, seorang pendakwah Islam dan warganegara India, kerana pihak berkuasa di India ingin menyiasatnya atas tuduhan melakukan kegiatan pengganas dan pengubahan wang haram. Antara lain, D mengatakan bahawa imej antarabangsa Malaysia akan terkesan kerana terus melindungi P dan memberinya keistimewaan untuk tinggal secara tetap apabila perkara yang wajar dilakukan adalah mengekstradisi P ke India supaya beliau dapat membersihkan namanya atas dakwaan tuduhan jenayah tersebut. Dalam penerbitan kedua, D menyerang P dengan membuat kenyataan terbuka yang menyinggung perasaan dan tidak menyenangkan kepada masyarakat Hindu di Malaysia dan yang mengancam solidariti dan perpaduan nasional. Sekali lagi, D memohon Kerajaan untuk mengekstradisi P ke India untuk menghadapi tuduhan pengganas dan pengubahan wang haram. P, yang mendakwa bahawa beliau diberi status tempat tinggal tetap di Malaysia, menuduh bahawa penerbitan oleh D mengejek dan memalukannya dan menuduh bahawa beliau, antara lain, penjenayah yang mengelak dari ditangkap, seorang pendakwah yang tidak jujur yang menggunakan agama untuk menabur benih kebencian dan perselisihan dan seseorang yang datang untuk memecahbelahkan solidariti dan perpaduan rakyat di Malaysia dengan mengeksploitasi isu-isu perkauman dan agama untuk kelangsungan hidup dan keuntungannya sendiri. Dalam pernyataan pembelaannya, D menafikan memfitnah P dan, antara lain, meminta pihak berkuasa di India melarang Yayasan Penyelidikan Islam ('IRF') dan saluran televisyen yang dikenali sebagai Peace TV, kedua-duanya diasaskan dan dikendalikan oleh P, atas alasan bahawa kedua-dua entiti tersebut digunakan untuk mempromosikan keganasan dan kata-kata kebencian. Selanjutnya, atau sebagai alternatif, D bergantungan pada pembelaan kewajaran, komen yang berpatutan dan hak istimewa mutlak. D kemudian memohon (melalui lampiran 29) untuk penzahiran dan pengemukaan dokumen terhadap P menurut A 24 k 3 dan/atau 7 Kaedah-Kaedah Mahkamah 2012. Dokumen yang perlukan D untuk P kemukakan adalah: (a) kesemua dokumen yang berkaitan dengan status mastautin tetap P ('PR') termasuk permohonannya untuk PR, kelulusan yang diberikan oleh pihak berkuasa yang berkaitan dengan perkara tersebut, dan salinan kad PR P dan pasportnya yang diendorskan dengan kebenaran masuk ('item 1'); (b) kesemua dokumen yang berkaitan dengan larangan kemasukan P ke United Kingdom ('UK') dan Kanada dan dua bantahannya terhadap larangan tersebut di Mahkamah UK pada tahun 2010 dan 2011 terhadap Secretary of State for the Home Department ('item 2 dan 3'); (c) kesemua dokumen yang berkaitan dengan kedudukan P dan hubungannya dengan IRF dan Peace TV/Peace TV Urdu ('item 4'); (d) semua surat-menyurat, dokumen dan komunikasi lain antara Direktorat Penguatkuasaan India, Jabatan Hasil,

kepada P atau IRF ('item 5'); (e) salinan kesemua dokumen mahkamah yang berkaitan dengan bantahan yang dikemukakan oleh atau atas nama P atau oleh atau atas nama IRF terhadap Direktorat Penguatkuasaan ('item 6'); (f) kesemua dokumen berkaitan mengenai penggantungan lesen Peace TV/Peace TV Urdu oleh Ofcom UK ('item 7'); dan (g) kesemua dokumen material lain dan relevan dengan fakta dan perkara yang diplidkan dalam pembelaan D dalam pengetahuan, jagaan dan kawalan P yang mana akan mempengaruhi tuntutan P atau menyokong tuntutan D atau boleh membawa kepada rangkaian persoalan dalam memperoleh maklumat yang mungkin mempengaruhi tuntutan P atau menyokong tuntutan D ('item 8'). Dalam membantah lampuran 29, P mengatakan, antara lain, bahawa dokumen-dokumen yang dimohon adalah tidak relevan, bahawa mereka tidak ada dalam kawalannya (dan oleh itu tidak dapat dikemukakannya), bahawa terdapat kelewatan yang tidak wajar dalam pemfailan lampiran 29 dan pemfailan lampiran 29 adalah untuk melambatkan perbicaraan tuntutan fitnah.

Diputuskan, memerintahkan P untuk mengemukakan dokumen yang disenaraikan dalam item 2 dan 3, 4, 5, 6 dan 7 tetapi menolak pengemukaan dokumen yang disenaraikan dalam item 1 dan 8:

(1) Ujian untuk membenarkan pengzahiran dan pengemukaan dokumen adalah sama ada dokumen yang dimaksudkan diperlukan baik untuk melupuskan perkara tersebut secara adil atau untuk menjimatkan kos, sepertimana A 24 r 8 dan k 13(1) KKM (lihat perenggan 16).

(2) Berdasarkan kepada pliding, isu dakwaan larangan masuk P ke United Kingdom dan Kanada dan bantahannya di Mahkamah UK terhadap larangan tersebut jelas dibangkitkan. Begitu juga isu hubungan P dengan Yayasan Penyelidikan Islam dan Peace TV, tindakan antara pihak berkuasa India dan P atau Yayasan tersebut serta larangan Peace TV. Oleh itu, pengzahiran dokumen yang disenaraikan dalam item 2 dan 3 serta 4, 5, 6 dan 7 adalah perlu dan relevan dengan isu-isu yang dibangkitkan dalam kes semasa. Mereka perlu untuk melupuskan tindakan semasa dengan adil dan demi menjimatkan kos (lihat perenggan 24, 32 & 46).

(3) Pengemukaan dokumen yang diminta dalam item 1 tidak dibenarkan kerana tidak relevan dengan isu yang akan dibicarakan dalam tindakan semasa. P telah mengemukakan salinan nombor kad PRnya. Ia adalah bukti status PRnya. Bagaimana beliau memperoleh PR, sama ada P memenuhi syarat untuk pemberian permit kebenarana masuk dan sama ada PR tersebut diperoleh secara tidak sah (seperti yang didakwa oleh D) tidak timbul untuk ditentukan oleh mahkamah ini. Ini bukan forum yang tepat untuk menentukan kesahan PR tersebut atau sebaliknya (lihat perenggan 78–80).

(4) Pengeluaran dokumen yang diminta dalam item 8 tidak dibenarkan

kerana permintaan dalam item 8 tidak menyatakan dokumen atau kelas dokumen tertentu dan seperti *fishing expedition* untuk bukti (lihat perenggan 81–82).

(5) Pengataan yang dikatakan memfitnah dalam kes semasa adalah berdasarkan perkara yang dilaporkan di pelbagai media berita. Dalam tindakan ini, P telah mempertikaikan perkara tersebut. Bukti utama untuk perkara tersebut adalah milikan, jagaan atau kawalan P. Oleh itu, P harus mengemukakan dokumen yang perlu atau relevan dalam menentukan perkara tersebut. Aturan 24 k 3 KKM (mengenai perintah pengzahiran dokumen) merujuk kepada dokumen 'yang' atau 'telah' dimiliki atau dikawal oleh seseorang. Begitu juga, A 24 k 7 merujuk pada dokumen atau kelas dokumen yang 'ada' atau 'pada bila-bila masa' berada dalam milikan, jagaan atau kawalan pihak tersebut. Sekiranya tidak ada dalam milikan, jagaan atau kawalannya, pihak tersebut harus menjelaskan melalui afidavit 'bila beliau berpisah dengannya dan apa yang telah terjadi kepadanya' (lihat perenggan 54 & 57–58).

(6) Dokumen yang dapat dizahirkan di bawah A 24 KKM termasuklah dokumen yang berada dalam kuasa atau kawalan P untuk dihasilkan dan termasuk dokumen yang P mempunyai hak memperolehnya walaupun mereka tidak berada dalam milikan sebenar atau fizikalnya. Ini termasuk dokumen yang telah atau sudah dimiliki oleh ejen P, dokumen yang berkaitan dengan prosiding mahkamah atau tindakan penguatkuasaan yang dibawa terhadap P di India atau United Kingdom dan yang berkaitan dengan IRF dan Peace TV (lihat perenggan 59–63).

(7) Berdasarkan fakta, tidak ada kelewatan di pihak D dalam memfailkan lampiran 29; lebih-lebih lagi, sebarang kelewatan yang panjang atau tidak masuk akal yang akan membenarkan penolakan lampiran 29. D juga tidak cuba untuk melambatkan perbicaraan dengan memfailkan lampiran 29. Mahkamah berpendapat bahawa lampiran 29 adalah suci hati untuk melupuskan perkara tersebut dengan adil dan untuk menjimatkan kos. Mahkamah memiliki budi bicara yang luas bila untuk memberikan pengzahiran. Walaupun di bawah A 24 KKM perintah seperti itu dapat dibuat 'pada bila-bila masa' dan 'di mana-mana peringkat prosiding', ianya lebih mudah untuk memerintahkan pengzahiran setelah pliding ditutup supaya isu-isu tersebut ditetapkan dan ditentukan oleh pliding (lihat perenggan 69–70 & 75–76).]

Cases referred to

Bandar Utama Development Sdn Bhd & Anor v Bandar Utama 1 Jmb [2018] MLJU 697; [2019] 10 CLJ 516, CA (refd)

Faber Merlin Malaysia Bhd v Ban Guan Sdn Bhd [1981] 1 MLJ 105, FC (refd)

Naik v Secretary of State for the Home Department and another [2010] EWHC 2825 (Admin), QBD (refd)

Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-0 Enterprise Bhd & Ors [2009] 5 MLJ 40, CA (refd)
R (Naik) v Secretary of State for the Home Department [2011] EWCA Civ 1546, CA (refd)
Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994] 2 CLJ 581, HC (folld)

Legislation referred to

Penal Code
Rules of Court 2012 O 18 rr 19, 20, O 23, O 24, O 24 rr 3, 7, 7(3), 8, 12(1), 13(1)
Sedition Act 1948

Sulaiman Abdullah (Akberdin Abdul Kader, Mohd Rafie Mohd Shafie, Meor Hafiz Salehan and Ardy Suffian Akberdin with him) (Akberdin & Co) for the plaintiff.
K Shanmuga (Fahri Azzat and Nasyrah Samir with him) (Kanesalingam & Co) for the defendant.

Quay Chew Soon JC:

INTRODUCTION

[1] The defendant ('D') filed an application vide encl 29 ('encl 29') for discovery and production of documents against the plaintiff ('P'). Enclosure 29 was made under O 24 rr 3 and/or 7 of the Rules of Court 2012 ('the ROC') and the inherent jurisdiction of the court.

[2] I allowed encl 29 in part. P filed an appeal to the Court of Appeal against my decision. These are the grounds of my decision.

ENCLOSURE 29

[3] D requested for the following documents to be produced by P (as set out in the Schedule to encl 29):

(1) All documents relating to P's status as permanent resident including:

(a) application form;

(b) approval letters from all Malaysian government authorities including Home Ministry, Immigration Department and National Registration Department; and

(c) copy of P's PR card and P's passport with endorsement of entry permit ('item 1').

(2) All documents relating to P's denial of entry to the United Kingdom and his challenges in court in the United Kingdom including case number CO/8625/2010 as reported in the following cases or any other case:

(i) *Naik v Secretary of State for the Home Department and another* [2010] EWHC 2825 (Admin) (High Court of Justice Queen's Bench Division Administrative Court, United Kingdom);

(ii) *R (Naik) v Secretary of State for the Home Department* [2011] EWCA Civ 1546 (Court of Appeal (Civil Division), United Kingdom) ('Item 2').

(3) All documents relating to P's denial of entry to Canada, as recounted in National Post news report entitled: *'Controversial Muslim televangelist Zakir Naik banned from Toronto conference'* found at the following url: https://nationalpost.com/news/canada/controversial-muslim-televanqelist-zakir-naik-banned-from-toronto-conference 'item 3');

(4) All documents relating to P's position in and relationship to the Islamic Research Foundation and Peace TV and/or Peace TV Urdu ('item 4');

(5) All correspondence, documents and other communications between the Directorate of Enforcement, Department of Revenue of the Government of India in relation to P or the Islamic Research Foundation (of which P is the President and founder) ('item 5');

(6) Copies of all court documents relating to the challenges brought by or on behalf of P or by or on behalf of the Islamic Research Foundation against the Enforcement Directorate ('item 6');

(7) All documents relating to the suspension of the licence of Peace TV and/or Peace TV Urdu by Ofcom UK ('item T).

(8) All other documents material and relevant to the facts and matters pleaded in D's defence in P's custody, care and control which:

(i) would either adversely affect P's claim or support D's claim; or

(ii) may lead to a series of inquiry resulting the obtaining of information which may either adversely affect P's claim or support D's claim ('item 8').

[4] I ordered P to produce the documents listed in items (2), (3), (4), (5), (6) and (7) above ('subject documents'). But I did not allow D's application for production of the documents listed in items (1) and (8) above.

BACKGROUND

[5] P is a permanent resident of Malaysia. He is an Islamic preacher.

[6] D is a Member of the Malaysian Parliament representing the constituency of Ipoh Barat. He is also the National Vice Chairman of the

Democratic Action Party ('DAP'). He was formerly the Minister of Human Resources of Malaysia. A

[7] P avers that D had defamed, ridiculed and humiliated him.

[8] On 17 April 2017, D made certain remarks about P which were published on Free Malaysia Today, an online media portal, in an article entitled: 'DAP: No reason for Malaysia to protect Zakir Naik' which may be accessed vide https://www.freemalavsiatodav.com/category/nation/2017/Q4/17/dap-no-reason-for-malavsia-to-protect-zakir-naik ('FMT article'). B C

[9] The remarks made by D in the FMT article, as underlined below, are alleged to be defamatory of P ('first impugned statements'):

> DAP's M Kulasegaran has urged the government not to 'take sides' by providing a safe haven for fugitive Islamic preacher Zakir Naik in Malaysia. D
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> This followed reports that authorities in India were waiting to investigate him on allegations that his speeches spread terrorist propaganda.
>
> Instead, the Ipoh Barat MP called for the government to work together with India to eliminate any crime or wrongdoing. E
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> '*The government should not be protecting him*. If it was a similar situation for others, the government would have deported him and not taken sides,' he told FMT today.
>
> Earlier today, Kulasegaran had posted on Facebook, saying: '*As long as Zakir remains in Malaysia, he will drag Malaysia further down. At the back of the minds of the Indian community in this country. it appears that a fugitive is given better protection than the local Indians*'. F
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> He said there was no reason for Malaysia to act as a safe haven for Zakir, adding that it would more likely embarrass the country in the international arena.
>
> Kulasegaran, who is also a lawyer, said Zakir should go back to India and clear his name. G
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> '*Zakir out of nowhere has become somebody in Malaysia* with his speeches and Perkasa honouring him for his contributions,' he said, referring to Malay right- wing group Perkasa which yesterday presented Zakir with its warrior award for his contributions towards the struggle of Islam. H
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> '*Why is he reluctant?* Now he is saying Muslims are not treated fairly in India. These are arguments that hold no water because money laundering has nothing to do with this. *There is a huge amount of money being transferred here and there*'.
>
> Kulasegaran was referring to an April 15 news report in the Hindustan Times saying that the Indian enforcement directorate had filed a charge sheet against Aamir Gazdar, a confidante of Zakir's, and Harmony Media Limited — a company floated by Zakir-for allegedly laundering money on his behalf. I
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> The Indian authority's 1,000-page charge sheet lists Zakir as an accused in the case.

A It includes the statements of witnesses and several documents which establish the trail of laundered money.

The Times of India has also reported that the Indian National Investigation Agency (NIA) will seek an Interpol notice against Zakir to curb his movements outside Saudi Arabia if he fails to turn up for a probe on his activities.

B

This came after the controversial Indian preacher had defied repeated summonses.

The report quoted an NIA official as saying the 'red' notice would be issued once a non-bailable warrant against him is procured.

C Last November, India banned Zakir's Islamic Research Foundation for five years, citing his 'objectionable and subversive' speeches.

Zakir has said he is willing to be questioned by authorities in India, but only through virtual media as he claimed he would be tortured if he goes back to India.

D **[10]** P contends that the first impugned statements imputed the following against him:

(a) that P is a criminal;

E (b) that P is evading arrest;

(c) that P's presence and stay in Malaysia has tarnished the good name and reputation of Malaysia;

(d) that P has benefited more rights, privileges and protection from the F Malaysian Government as compared to the Indian community, the citizens of Malaysia;

(e) that P is involved in money-laundering and illegal activities; and

(f) that P is not an honest Muslim preacher in propagating the teachings of G Islam.

[11] More than two years later on 13 August 2019, D made further statements about P in a press release titled: 'Zakir Naik's presence in Malaysia is embarrassing to all Malaysians', vide D's 'official' letter on the letterhead of H the Menteri Sumber Manusia.

[12] The statements made by D in the said press release, as underlined below, are alleged to be defamatory of P ('second impugned statements'):

I Menteri Sumber Manusia

Zakir Naik's presence in Malaysia is embarrassing to all Malaysians

For questioning the loyalty of Malaysian Hindus and touching a raw nerve in our Multi-ethnic society, necessary action must be taken against the controversial preacher. Zakir Naik.

Naik is an outsider *who is a fugitive* and has little knowledge of the Malaysian history therefore *he should not be given such privilege to run down other Malaysians, what more in Questioning their loyalty to the country. His actions do not reflect one deserving of a permanent resident status* and this will be brought up in the next Cabinet Meeting.

Is Naik also *attempting to create a fissure in a multi-ethnic and religious society so that he continues to enjoy immunity and privilege by obtaining the support of the Muslim community to continue to stay in this country*?

Is Naik also *leveraging the current polemics related to race and religion in the country for his biased survival and benefits* vide the tax payers' money?

... Should *Malaysians be split over* a man called Zakir Naik?

Therefore, it's time for Malaysians to unite and safeguard the peace and stability of the nation by exposing the *dubious strategy of Naik in using religious and racial sentiments* in a tolerant and harmonious country. *It's time for the fugitive foreigner to leave Malaysia and to face charges of terrorism* and money laundering charges in India.

Naik recently *compared the Hindus in Malaysia to the Muslims in India and said that the former enjoyed more than 100% rights in Malaysia compared to Muslims in India*.

...

If one relates his tribalism speech in Kota Baharu, it further seems to co-relate the Umno/Pas tactics that destabilizes the Pakatan Harapan coalition Government through ethno-religious sentiments which is a regretful misuse of religion in this country.

M Kula Segaran

Minister of Human Resources

[13] P contends that the second impugned statements imputed the following against him:

(a) that P is a dishonest person who would abuse the Islamic religion for his selfish purpose;

(b) that P has unfairly and dishonestly accused the Malaysian Hindus of being disloyal to Malaysia;

(c) that P calculatedly attempted to create a gap among the multiethnic and multi-religious Malaysians in order to obtain the support of the Malaysian Muslim community so as to enjoy immunity and privilege for his continued stay in Malaysia;

(d) that P is dishonestly leveraging and taking advantage of the current polemic relating to race and religion in the country for his survival and benefit;

(e) that P has dubious motives of splitting the Malaysian population and bringing about disharmony or disunity among them;

A (f) that P does not deserve to be accorded a permanent residency in Malaysia; and

(g) that P is a criminal and has committed several offences, including offences under the Penal Code and the Sedition Act 1948.

B

[14] On 27 November 2019, P filed this suit for defamation against D. On 20 January 2020, D filed his statement of defence ('defence'). On 3 February 2020, P filed his reply.

C **[15]** D denies defaming P, or that P has any reputation capable of being defamed. Further or in the alternative, D pleaded the defences of justification, fair comment and qualified privilege.

THE LAW

D

[16] The test for ordering discovery and production of documents is whether the documents in question are necessary either for disposing fairly of the matter or for saving costs (see O 24 rr 8 and 13(1) of the ROC).

E

[17] This test was reiterated by the Court of Appeal in *Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40 at p 51 as follows:

> [25] ... discovery may only be ordered if the court is of opinion that such order is *necessary* either for *disposing fairy* of the cause or matter or for saving costs. The *test is necessity* not fairness and it is for the applicant to satisfy the court ...

F

[18] In *Bandar Utama Development Sdn Bhd & Anor v Bandar Utama 1 Jmb* [2018] MLJU 697; [2019] 10 CLJ 516 at p 527, the Court of Appeal discussed the jurisprudence related to discovery and referred to the 'train of inquiry' concept as follows:

G

> [11] (b) *What amounts to relevance* was *discussed in Surface Stone Pte Ltd v Jay Seng Leon and Another* [2011] SGHC 223*, in reliance of the case of Compagnie Financiere du Pacifique v Peruvian Guano* [1882] 11 QBD 55, where the court said: 'It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains *information which may* — not which must — either *directly or indirectly* enable the party requiring the affidavit either to *advance his own case* or to *damage the case of his adversary.* I have put in the words 'either directly or indirectly', because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a *train of inquiry, which may have either of these two consequences* ...

H

I

[19] The 'train of inquiry' concept appears to be reflected in Order 24 r 7(3) of the ROC which makes reference to a 'series of inquiry'. The said rule describes the document, or class of document, which are discoverable as falling within one of the following descriptions:

> (a) a document on which the party relies or will rely;
>
> (b) a document which could —
>
> (i) adversely affect his own case;
>
> (ii) adversely affect another party's case; or (Hi) support another party's case; and
>
> (c) a document which may lead the party seeking discovery of it to a *series of inquiry* resulting in his obtaining information which may:
>
> (i) adversely affect his own case;
>
> (ii) adversely affect another party's case; or
>
> (iii) support another party's case.

[20] The fact that the documents to be produced may be voluminous or numerous is no excuse from providing discovery if they are relevant. In *Faber Merlin Malaysia Bhd v Ban Guan Sdn Bhd* [1981] 1 MLJ 105, the Federal Court allowed the production and inspection of bills, invoices and contracts made between the defendant and all its nominated subcontractors relating to the construction project in question. As well as records of wages of the defendant's workmen and all bills and invoices for the purchase of materials by the defendant relating to the said construction project.

[21] The Federal Court held that the documents in question ought to be produced so long as they are relevant, despite the complexity or immensity of the task. The court said at pp 106–107:

> If it be the case that discovery is tied to the question whether it is relevant to any issue or question raised on the pleadings, then the court may order the determination of that issue or question before deciding on the extent of the order for discovery ... But where the *issue or question is clearly raised in the cause or matter*, then equally clearly the order for discovery must be determined by the consideration whether it is necessary at the stage of the application.
>
> Therefore, if as a *matter of pleadings*, the issue is the quantum of the claim, then the *documents, 'the tens of thousands'* of them in the defendant's possession notwithstanding, *must be produced for its proper ascertainment because they are relevant* to it. The *complexity or immensity of the task should not be a deterrence.* Sooner or later, it will have to be undertaken and it should be done as a pre-trial measure rather than at the trial itself.

[22] In *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU

96 at p 12; [1994] 2 CLJ 581 at p 585, the High Court said:

> The essential elements for an order for discovery are threefold, namely first, there must be a 'document', secondly, the *document must be 'relevant'* and thirdly, the document must be or have been in the 'possession, custody or power' of the person against whom the order for discovery is sought.

[23] The court further said that whether the documents are necessary or relevant is primarily determined by reference to the pleadings. The following passage from *Yekambaran* is instructive:

> In this context, *relevance is defined broadly.* It does not extend to documents relevant merely to a party's credibility unless that itself is a fact in issue. … If, however, the *document's relevance is to a fact in issue,* not simply to credibility, it has long been settled that *relevance of an indirect kind suffices.*

DECISION

[24] Based on the pleadings, I find that the subject documents are relevant to the issues raised in the present case. Further, it is my finding that the subject documents are indeed necessary, both for disposing fairly of the instant suit and for saving costs. Each item of the subject documents will be addressed in turn. Although a similar reasoning may apply across certain of the said items.

Items (2) and (3) of the subject documents

[25] Items (2) and (3) of the subject documents can be conveniently dealt with together as they relate to the alleged denial of P's entry to certain countries, in this case the United Kingdom and Canada.

[26] Under item (2) of the subject documents, D requested documents relating to P's denial of entry to the United Kingdom and his challenges in court in the United Kingdom.

[27] Under item (3) of the subject documents, D requested documents relating to P's denial of entry to Canada.

[28] D pleaded that P had been prohibited from entering the United Kingdom as his speeches and writings have been deemed by the authorities to promote hate and terrorism (see paras 3.2 and 10.5 of the defence).

[29] D further pleaded that P was denied entry to the United Kingdom by various decisions of the UK Home Office between June and August 2010, inter alia, for engaging in unacceptable behaviour by making statements that attempt to justify terrorist activity and fostering hatred. The decision by the

UK Home Office to deny entry to P was challenged by him in the English courts, but his application was unsuccessful (see paras 11.1–11.2 of the defence).

[30] D also pleaded that P had been denied entry, inter alia, to Canada in 2010 because of his hate speech and promotion of terrorism (see paras 10.5 and 11.3 of the defence).

[31] In item (2) of the subject documents, D referred to two news reports and judgments of the courts of England and Wales, which are already within his knowledge. D said that the English court papers show that P took an active part in those proceedings.

[32] As a matter of pleading, the issue of the alleged denial of P's entry to the United Kingdom and his challenges in court in the United Kingdom were clearly raised. As was the issue of the alleged denial of P's entry to Canada. I therefore consider items (2) and (3) of the subject documents to be relevant and necessary.

Items (4), (5), (6) and (7) of the subject documents

[33] Items (4), (5), (6) and (7) of the subject documents are dealt with together as they concern the same jurisdiction ie India. And are in relation to: (i) the Islamic Research Foundation (of which P is said to be the founder and President) ('foundation'); and (ii) Peace TV (a television channel said to be founded by P).

[34] Under item (4) of the subject documents, D requested documents pertaining to P's position in and relationship to the foundation and Peace TV.

[35] Under item (5) of the subject documents, D requested documents and communications between the revenue enforcement authority of India and P or the foundation.

[36] Under item (6) of the subject documents, D requested court documents relating to challenges by P or the foundation against the Indian revenue enforcement authority.

[37] Under item (7) of the subject documents, D requested documents relating to the suspension of the licence of Peace TV.

[38] D pleaded that that P is a citizen of India and is a fugitive from justice. That he is wanted by the police or other equivalent authority in India for

investigation or arrest in connection with charges of money-laundering against P (see para 3.1 of the defence).

[39] Further, D pleaded that P was facing charges in India, inter alia, for money laundering offences. That P refused to return to India to answer these charges. According to D, he expressed his honest opinion that P ought to return to India to face the justice system in his home country and clear his name (see paras 9.1 and 20.3 of the defence).

[40] D contends that his remarks quoted in the FMT article when read as a whole meant that the actions of the Government of Malaysia may lead ordinary Indian Malaysians to feel disgruntled that a person facing criminal charges was given the privilege of permanent residency so easily and quickly. And given protection of the Government of Malaysia, when many local Indian Malaysians faced discrimination and hardship. D pleads fair comment on a matter of public interest (see para 9.2 of the defence).

[41] D also pleaded the following (see paras 10.1, 10.2 and 10.3 of the defence):

(a) on 17 November 2016, the relevant authorities in India had banned the foundation, an organisation founded by and principally operated by P, for activities considered to be in the promotion of terrorism;

(b) from early 2017, news report emerged that the authorities in India had commenced criminal proceedings against P for alleged money laundering. They were also investigating him for spreading enmity among various communities. It was also reported that P had a non-bailable arrest warrant issued against him; and

(c) as early as February 2017, P was quoted in a news report by the Business Standard, India to have expressed through his Indian lawyers a fear of arrest if he sets foot in India. This appeared in an article entitled 'Fearing arrest on landing in india, Zakir Naik seeks questionnaire from ED' published on 26 February 2017 found at the url: *https://www.business-standard.com/article/news-ani/fearing-arrest-on-landing-in-india-zakir-naik-seeks-questionnaire-from-ed-1170226001751.html*

[42] Further, D pleaded that P by himself or through his agents operates or is responsible for the broadcast of a television channel known as Peace TV. And that Peace TV has been banned or prohibited from being broadcast or otherwise restricted from broadcast, inter alia, in India, Bangladesh, Sri Lanka and the United Kingdom (see para 10.6 of the defence).

[43] Items (4), (5) and (6) of the subject documents relate to allege criminal

charges against P or the foundation. Whilst item (7) pertains to the ban by the UK authorities of Peace TV.

[44] D avers that P has control over the foundation and Peace TV. In support, D referred to exh DZN4 of P's own affidavit affirmed on 2 July 2020 and filed herein. The said exhibit contained the profile of P and shows his association with these entities. Page 4 of the said exhibit reads:

> Dr Zakir Naik — A Brief Introduction
>
> He is the president of Islamic Research Foundation International.
>
> The idealogue and driving force behind Peace TV Network is Dr Zakir Naik. He launched Peace TV English, in January 2006.

[45] Together with his remarks quoted in the *FMT article*, D shared the following news article on his *Facebook* page (see para 11.6 of the defence):

> On 17.4.2017, ... a concerned citizen) penned an opinion piece entitled *'Zakir Naik should return to India to face trial'* which was published by the online news portal Malaysiakini at the uri: *https://www.malavsiakini.com/news/379369*. The article reads as follows:
>
> ...
>
> Interpol red alert
>
> Although an Interpol red alert has been sought against Zakir Naik under a non-bailable warrant issued by Mumbai's Prevention of Money Laundering Act court, no action has been taken to repatriate him back to India.
>
> This has placed Zakir as a prime suspect in some major money-laundering. And, instead of going back to India to contend his case in court, the defiant preacher accused the Indian authorities of having 'double motives'.
>
> Malaysians should not be duped by Zakir's argument that he had offered India's National Investigation Agency (NIA) an interview through videoconferencing or phone. No authorities would agree to that.
>
> By remaining here in Malaysia or elsewhere, Zakir is putting more strain on the country's reputation. Certainly, he does not care as long as he has a place to escape, but it does not go well on his own reputation.
>
> If he has done nothing wrong, he should surrender himself to the Indian authorities and request for the interview to be recorded or observed through glass windows by his lawyers. His defiance puts Zakir in a bad light.
>
> Unless he has something to hide, he should not be afraid to face the NIA. The NIA would not have applied for the Interpol alert unless they have obtained solid evidence against Zakir.
>
> Fugitives have no credibility
>
> Zakir can continue living as a fugitive, but whatever he preached will no longer

A hold water. We are talking common sense, and there is no attempt to belittle any religion. This is a case involving someone who is being pursued by the Indian authorities.

On the back of everyone's mind is: 'Why is this man running away from the authorities? Is he involved in money-laundering? Why is he allowed to settle B down in Malaysia? ...

There are only two options for Zakir. Either he continues to live in Malaysia and remain as a fugitive, or he returns to India to face the law enforcers if he believes that he is not guilty of the charges against him ...

C As long as Zakir remains in Malaysia, he will drag Malaysia further down. At the back of the minds of the Indian community in this country, it appears that a fugitive is given better protection than the local Indians. ...

D **[46]** As a matter of pleading, the issue of P's relationship with the foundation and Peace TV were clearly raised. As were actions between the Indian authorities and P or the foundation. So too was the banning of Peace TV. Hence, I consider items (4), (5), (6) and (7) of the subject documents to be relevant and necessary.

E THE PLAINTIFFS CASE

[47] In opposing encl 29, P canvassed the following four arguments.

F **[48]** First, P contends that the subject documents are irrelevant. I disagree. As discussed earlier, I find that the subject documents are indeed relevant to the issues raised in the present case.

[49] Second, P said that this action of defamation against D is meritious. G According to P, D has filed in a baseless defence, in which the defence relied on by D is based on third party sources which are not verified or authenticated.

[50] However, I do not think the merits or otherwise of P's claim and D's defence respectively should be adjudicated at this stage. That might perhaps H arise for consideration in a striking out application under O 18 r 19 of the ROC.

[51] But for purposes of a discovery application pursuant to encl 29, the applicable consideration is whether the subject documents are necessary either I for disposing fairly of the matter or for saving costs. I am satisfied that is indeed the case here.

[52] As regards P's allegation that D's defence is based on third party sources which are unverified or unauthenticated, it seems to me that a reason why the

subject documents are being sought by D is for the purpose of verifying the said third party sources. I am aware that D cannot shift the burden of proving his defences to P. However, I do not see encl 29 as tantamount to doing that.

[53] P has come to court to vindicate himself. P says that D has defamed him and tarnished his reputation. In defending the suit, D (as he is entitled to do) has put P to proof with regard to the matters P have relied on to establish his reputation.

[54] The first impugned statements and the second impugned statements were based on matters reported in various news media. In this action, P has put these matters in dispute. The primary evidence for these matters are in P's own possession, custody or power. In the circumstances, P should produce the subject documents which are necessary or relevant in determining these matters.

[55] Third, P said that the subject documents are not in his possession. Fourth, P alleges that there was a delay in filing encl 29 and that D is trying to delay the trial by filing encl 29. I will deal with these two arguments.

Possession, custody or power

[56] P said that the subject documents are not in his possession. And that since the subject documents are not in his possession, P could not produce them to D.

[57] However, O 24 r 3 of the ROC (concerning an order for discovery of documents) refers not only to documents which are in one's 'possession'. It also speaks of documents which are in a party's 'power'. Next, it refers not just to documents 'which are' (ie present tense) in one's possession or power. It also speaks of documents which 'have been' (ie past tense) in a party's possession or power.

[58] In similar vein, O 24 r 7 of the ROC (concerning an order for discovery of particular documents) refers to a document or class of document which 'is' (ie present tense) or 'has at any time been' (ie past tense) in a party's possession, custody or power. If not then in his possession, custody or power, that party must explain in affidavit 'when he parted with it and what has become of it'.

[59] In my opinion, documents that are or have been in P's power include documents which, although not within his possession, he possesses the right to obtain from the person who has actual possession of such documents. That is to say, P has the power to obtain or procure such documents. To my mind,

these would include documents which are or have been in the possession of his agent.

[60] D made inquiries through a firm of solicitors in Mumbai, India and discovered that P has appointed lawyers to act for him in the criminal proceedings against him in India. This is shown in the court minutes published on the Indian Sessions Court website showing the outcome of each day's proceedings. Copies of the said court minutes are contained in exh K12 of D's affidavit affirmed on 3 September 2020 and filed herein. Thus, D contends that P would have power or control over the documents in relation to the criminal proceedings brought against him.

[61] I am of the view that discoverable documents under O 24 of the ROC includes documents that are within the power or control of P to produce. This includes those documents which P has a right to obtain although not within his actual or physical possession.

[62] From the affidavit evidence of P himself, it seems to me that he has the power to obtain the subject documents, given his association with the foundation and Peace TV. As pointed out earlier, P's profile states that he is the president of the foundation. And describes him as the idealogue and driving force behind Peace TV.

[63] It appears rather telling that P simply said that the subject documents are not in his 'possession'. He does not deny that the subject documents are within his 'power' or control, it seems to me that P has the power to obtain the subject documents from his solicitors having conduct of the proceedings or enforcement actions in the United Kingdom and India.

[64] If P claims otherwise, he must make an affidavit stating whether any of the subject documents is, or has at any time been, in his 'power'. And if not then in his 'power', he must explain in affidavit 'when he parted with it and what has become of it'.

DELAY

[65] P argues that encl 29 should be dismissed as there was a delay in filing the same. And that D is trying to delay the trial by filing encl 29.

[66] On 11 June 2020, D's solicitors sent to P's solicitors a bundle of documents which D intends to rely on at the trial. At the same time, D's solicitors issued a notice to produce documents in relation to the subject documents ('notice to produce'). About two weeks later in a reply dated 26 June 2020, P's solicitors declined to produce the subject documents on the

premise that they are irrelevant and are not in P's possession.

[67] P complains that the notice to produce (which was issued by D on 11 June 2020) came more than four months after the filing of the defence (which was filed on 20 January 2020). Further, P complains that after more than two months from the notice to produce, D only then filed encl 29 on 28 August 2020.

[68] According to P, if the subject documents are material and relevant, the notice to produce and encl 29 should have been issued and filed by

D before the filing of the defence. Or as soon as possible before the close of pleadings. But D failed to do so. I disagree.

[69] First, the court has a wide discretion as to when to order discovery. Under O 24 of the ROC, such order may be made 'at any time' (see rr 3(1) and 7(1)) and 'at any stage of the proceedings' (see r 12(1)).

[70] Second, I am of the view that it would be more expedient to order discovery after the close of pleadings. So that the issues are crystallised and defined by the pleadings. In this regard, I concur with the following commentary from the *Malaysian Civil Procedure 2018*, Vol 1 at p 355:

> Stage where discovery may be ordered — The court has a wide discretion as to when to order discovery. Generally it is inexpedient and unnecessary to do so until the issues have been defined by the pleadings. Save in exceptional circumstances, the practice is to refuse discovery before the close of pleadings. This is because without the benefit of the pleadings, the court can seldom know what are the matters in question in the action.

[71] The pleadings in the present case are deemed to have closed on 17 February 2020. Namely, at the expiration of 14 days after P filed and served his reply on 3 February 2020 (see O 18 r 20 of the ROC).

[72] Subsequent to the close of pleadings, D on 4 June 2020 filed an application for security for costs vide encl 14 against P under O 23 of the ROC ('encl 14'). Enclosure 14 was fixed for hearing on 14 August 2020 after affidavits had been exhausted and written submissions filed. At the hearing on 14 August 2020, I dismissed encl 14.

[73] In the intervening period between the close of pleadings and the filing of encl 14, recall that the movement control order ('MCO') was implemented on 18 March 2020. Understandably, the MCO disrupted and slowed down the

filing of interlocutory applications as well as preparation of the documents for trial.

[74] During a case management on 6 March 2020, pre-trial case management ('PTCM') directions were given regarding the preparation of documents for the trial. Both sides requested for more time to prepare the PTCM documents. According to the court minutes, P's solicitors said: 'we seek 2 months date for cm since our schedule are quite pack in March and April'. D's solicitors too requested for more time to file encl 14.

[75] After encl 14 was disposed of on 14 August 2020, D filed encl 29 on 28 August 2020. In the light of the narrative and timeline as outlined above, I do not find that there was any delay on the part of D in filing encl 29. Much less, any inordinate or unreasonable delay that would justify dismissing encl 29.

[76] Nor do I think that D is trying to delay the trial by filing encl 29. I find that encl 29 is a bona fide application that will go towards a fair disposal of the matter and costs saving.

Other items of the Schedule to encl 29 that were disallowed

[77] Before I end, I will briefly explain why items (1) and (8) of the Schedule to encl 29 were disallowed. Notwithstanding that D did not appeal against that part of my decision.

[78] D contends that if at all P is a permanent resident of Malaysia ('PR'), P procured that status unlawfully, (see para 3 of the defence). Under item (1) of the Schedule to encl 29, D requested documents relating to P's status as PR. I did not allow the same because it was not relevant to the issues to be tried in the instant suit.

[79] P had already produced a copy of his PR card number 651018–75–5049, PM: A0000027569. That is evidence of his PR status. How he obtained the PR, whether P fulfils the conditions for the grant of an entry permit and whether the PR was obtained illegally (as alleged by D) does not arise for determination by me. The action before me is one of defamation.

[80] This is not the proper forum to determine the validity or otherwise of P's PR. If D wishes to attack the validity of P's PR, he will have to do that in another forum. Perhaps by way of a challenge on an administrative decision made by a public law action for judicial review, where the grant of PR may be quashed by the court.

[81] Next under item (8) of the Schedule to encl 29, D requested all other

documents material and relevant to the facts and matters pleaded in D's defence in P's custody, care and control which: (a) would either adversely affect P's claim or support D's claim; or (b) may lead to a series of inquiry resulting the obtaining of information which may either adversely affect P's claim or support D's claim.

[82] I did not allow item (8) because it did not specify any particular document or class of document. This seemed like a fishing expedition for evidence to me.

CONCLUSION

[83] For the reasons above, I allowed encl 29 in part. I ordered costs to be in the cause.

Enclosure 29 allowed in part with costs.

Reported by Ashok Kumar